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ON JUDGMENTS AND SETTLEMENTS IN ANTITRUST LITIGATION: WHEN SHOULD DAMAGES BE TREBLED?

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Under the federal antitrust laws, private parties are authorized to institute suits to recover treble damages for any injury to business or property caused by an antitrust violation.[1] Since liabil-

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[1] Section 4 of the Clayton Act provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Clayton Act § 4, 15 U.S.C. § 15 (1976 & Supp. IV 1980), *as amended by* Act of Sept. 12, 1980, Pub. L. No. 96-349, § 4(a)(1), 94 Stat. 1156 (original version at ch. 323, § 4, 38 Stat. 731 (1914)).

Section 4 is the successor to section 7 of the Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) and to § 77 of the Tariff Act of 1894, ch. 349, § 77, 28 Stat. 570 (1894), which provided treble damages for the violation of any of its provisions. Initially, in presenting his draft of the antitrust bill, Senator Sherman proposed a provision for double damages. S. 3445, 50th Cong., 1st Sess., 19 CONG. REC. 7513 (1888). Senator Sherman's draft then was presented to the Senate Committee on the Judiciary which substantially rewrote and revised the proposal. *See* W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 94 (1965). Section 7, which authorizes private persons to sue antitrust violators for treble damages, actually was drafted by Senator George Frisbie Hoar, who apparently based the provision upon section 4 of the English Statute of Monopolies, 1623, 21 Jac. I., c. 3, § 4. *See* K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 64 (1976); E. KINTER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 257-58, 277 (1978); W. LETWIN, *supra*, at 94 & n.9 (citing Senate Committee on the Judiciary Minute Book 227-33 (March 31, 1890)). There is no record or indication of the Senate Committee's deliberations concerning the size of the damage multiple beyond Senator Hoar's dissatity is joint and several, the treble recovery may be obtained from any one defendant even if multiple parties are responsible for the damages.[2] The possible inequity of this result has engendered critical debate over whether defendants subject to liability for treble damages should be entitled to seek contribution from coconspirators in the unlawful activity.[3] Recently, the Supreme Court resolved this issue holding that existing law does not afford defendants the right to such contribution.[4]

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isfaction with double damages. K. ELZINGA & W. BREIT, *supra*, at 64.

Since the passage of the Sherman Act, there has been sporadic criticism and movement to reduce or abolish the mandatory triple damage award. *See* note 8 *infra*.

[2] Although the Sherman Act, 15 U.S.C. §§ 1-7 (1976), and the Clayton Act, 15 U.S.C. §§ 12-27 (1976 & Supp. IV 1980), are silent regarding the nature of liability among antitrust coconspirators, subsequent litigation has established that those who act in concert to violate the antitrust laws are jointly and severally liable. *See, e.g., In re* Uranium Antitrust Litigation, 617 F.2d 1248, 1257 (7th Cir. 1980); Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 393 (5th Cir. 1976); Wainwright v. Kraftco Corp., 58 F.R.D. 9, 11-12 (N.D. Ga. 1973); Washington v. American Pipe & Constr. Co., 280 F. Supp. 802, 804 (S.D. Cal.), *cert. denied*, 393 U.S. 842 (1968). A successful plaintiff, therefore, may look to any defendant for full satisfaction of his damage award. *In re* Uranium Antitrust Litigation, 617 F.2d at 1257; *see* Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 718 (2d Cir. 1978); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 52, at 314-15 (4th ed. 1971).

[3] The body of literature concerning contribution is sizeable. *See, e.g.*, Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331 (1980); Sellers, *Contribution in Antitrust Damage Actions*, 24 VILL. L. REV. 829 (1979); Sullivan, *New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution*, 1980 U. ILL. L.F. 389 (1980); Note, *Contribution in Antitrust Treble Damage Actions*, 6 J. CORP. L. 141 (1980); Note, *Contribution and Antitrust Policy*, 78 MICH. L. REV. 890 (1980).

For an overview of the positions on the topic, see Symposium, *Contribution Among Defendants—Availability and Impact in Antitrust Cases*, 48 A.B.A. ANTITRUST L.J. 1583 (1979). For a comparison between the antitrust contribution issue and the trend favoring contribution in the areas of tort, admiralty, and securities law, see Sullivan, *supra*, at 392-401.

[4] Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 2061, 2070 (1981). In *Texas Industries* the plaintiff, a purchaser of concrete, sued a manufacturer and seller of readymix cement, alleging that the manufacturer had conspired to fix prices in the New Orleans area in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). 101 S. Ct. at 2062. The sole-named defendant, along with others, had been indicted criminally for a price-fixing violation. Each criminal defendant entered a plea of nolo contendere in the criminal proceedings. *Id.* at 2063 n.4. Through discovery, the defendant manufacturer learned the identity of the codefendants in the criminal proceeding. The defendant sought to join those parties as third-party defendants in the civil suit, claiming contribution. *Id.* at 2063. The Fifth Circuit found no compelling reason "to create such a right as a matter of federal common law." Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 906 (5th Cir. 1979).

The *Texas Industries* Court turned to what it termed "a very significant and perhaps dispositive threshold question," namely, whether the federal courts possessed the authority to create the right of contribution under the antitrust laws without legislation. 101 S. Ct. at

Lost in the debate over contribution, however, is the antecedent question of what are the damages to be trebled when a partial settlement has been reached before the verdict. Although contribution focuses on the allocation of liability among coconspirators,[5] it does not address the initial calculation of treble damages when a coconspirator settles prior to judgment. This question is distinct from the question of contribution.[6] Existing case law holds that

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2065-66. There being no "uniquely federal interests" at stake and no suggestion that Congress intended to bestow the power to alter the statutory remedies that it provided, the Court concluded that the federal courts lacked the "broad power" to formulate a right of contribution. *Id.* at 2070. The net effect of the Supreme Court's decision in *Texas Industries* is to place the burden upon Congress to create a right of contribution or upon the courts to re-examine the methods for adjusting damages when there are pre-trial settlements.

For a synopsis of the myriad forms of contribution proposals and court decisions leading up to the *Texas Industries* decision, see Ponsoldt & Terry, *Contribution in Civil Antitrust Litigation: The Emerging Consensus in Legal Literature,* 38 WASH. & LEE L. REV. 315 (1981).

[5] The contribution question involves the distribution of liability for damages among multiple defendants. *See* W. PROSSER, *supra* note 2, § 50, at 310. Recently, much attention has been focused on the methods that would be used to allocate liability among joint antitrust violators if contribution were permitted. The threshold issue is whether the allocation should be made upon the basis of fault, or upon a pro-rata division of damages among the coconspirators, or according to the relative sales or purchases of each violator. *See* Ponsoldt & Terry, *supra* note 4, at 334. If the damages are to be allocated according to relative culpability, fault distribution mechanisms must be developed. *See* Sullivan, *supra* note 3, at 415 & n.131.

The contribution bill introduced by Senator Bayh, S. 1468, 96th Cong., 1st Sess., 125 CONG. REC. 17325 (1979); *see* notes 50-53 and accompanying text *infra,* proposed to allocate liability based on a "comparative benefits" approach—a distribution of damages according to the amount of purchase or sales attributable to the antitrust violation. *See* note 49 *infra.* Prior to the Supreme Court's decision in *Texas Industries,* the Eighth Circuit permitted contribution on a pro-rata basis. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1182 n.4, 1186 (8th Cir. 1979).

Each method presents its own difficulties. Indeed, one commentator has suggested alternative solutions based on the nature of the suit. *See* Cirace, *A Game Theoretic Analysis of Contribution and Claim Reduction in Antitrust Treble Damage Suits,* 55 ST. JOHN'S L. REV. 42, 46-62 (1980). If contribution were permitted in antitrust suits for price-fixing violations, for example, treble damages or claim reduction should be apportioned on the basis of market shares. *Id.* at 59-60. If contribution were allowed, however, in cases such as *Professional Beauty Supply,* where a dealer of cosmetic products alleged a conspiracy by a competitor and a manufacturer of beauty supplies to terminate its dealership, the allocation should be on a pro-rata basis, given the obvious problems for a court in allocating the relative culpability of each defendant. *Id.* at 60 n.39.

The complexity of the allocation issue appears to have been a factor in the Supreme Court's decision in *Texas Industries. See* 101 S. Ct. at 2065. Rather than endorsing a particular method of contribution, this Article attempts to demonstrate how a current inequity in antitrust may be corrected without reaching the complex issues addressed by the contribution proposals.

[6] *See* note 5 and accompanying text *supra.* While the issue of contribution is distinct

damages are to be trebled before deducting the amount of the settlement.[7] This Article explores the bases and implications of that rule, concluding that it can and should be changed to require that damages be trebled after deducting the settlement amount.[8] Such

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conceptually from the calculation of treble damages where there has been a settlement, any plan for contribution initially must determine the relative rights between the parties. First, may a defendant who litigates and loses recover contribution from a settling defendant? Second, may the settlor who has paid more than his share obtain contribution from a non-settling defendant? Third, how will a settlement by one defendant affect the liability of the remaining defendants? Fourth, will the liability of the litigating parties be lessened if the settlor has paid more than his apportioned share? Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331, 334 n.11 (1980). This Article will focus on the liability of the remaining antitrust defendants once one or more have settled with the plaintiff prior to judgment.

[7] *See* Flintkote Co. v. Lysfjord, 246 F.2d 368, 398 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). One commentator specifically has recognized the confusion between the distinct issue of contribution and the settlement rule established in Flintkote Co. v. Lysfjord, remarking that the *Flintkote* doctrine was "subsumed within the contribution doctrine but [it] had not been the subject of any direct comment." Salzman, *The Effect of Contribution of Litigation and Settlement: The Plaintiff's Viewpoint*, 48 A.B.A. ANTITRUST L.J. 1593, 1594 (1979). Concerned over the possible elimination of the present *Flintkote* windfall benefit to plaintiffs, he noted that one reason for the reaction against contribution proposals is that the "plaintiffs fear that people will wake up and start arguing against the Flintkote Co. v. Lysfjord doctrine, which has been quietly accepted—at least since 1957." *Id.*

[8] This Article assumes the continued existence of mandatory treble damages. On a policy level, however, there is a real question whether the treble-damage rule should be limited or abolished entirely. *See* Bernard, *The Actions of the Antitrust Plaintiff: Law, Policy and a Modest Proposal*, 16 DUQ. L. REV. 307, 329 n.85 (1977-78).

As early as 1898, Congressman William Greene, a Nebraskan populist, proposed reducing antitrust awards to double damages, while in 1908 Congressman William Hepburn proposed the elimination of any multiple award. K. ELZINGA & W. BREIT, *supra* note 1, at 64-65. During the 1950's several legislative proposals were introduced which would have permitted the courts to reduce treble damage awards at their discretion. *Id.* at 65. A similar view was espoused by a committee established by former Attorney General Herbert Brownell, Jr. *See* THE UNITED STATES DEPARTMENT OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 379 (1955). The committee observed that the "burgeoning of treble damages recoveries" required a re-examination of the mandatory treble damage award. *Id.* at 378. Believing that "the development of both the procedural and substantive law, largely favorable to the plaintiff, plus the award of attorney fees, affords sufficient incentive to [bring] private antitrust actions," the committee concluded that a proposal giving a trial judge the discretion to impose double or triple damages would not curtail this incentive. *Id.* at 379. To require mandatory trebling where the defendant was an inadvertent or unwitting violator would go beyond mere compensation without serving any deterrent purpose. *Id.*

In addition to not serving any deterrent or enforcement purpose, Professors Elzinga and Breit have argued that the treble damage award also may encourage several "economic inefficiencies." *See* K. ELZINGA & W. BREIT, *supra* note 1, at 81-96. The injured party, for example, has no incentive to eliminate or minimize his damages because the expected reparations exceed the possible damages. *Id.* at 84. Furthermore, a plaintiff may institute a "nuisance" suit in the hope of capitalizing on a defendant's fear of treble damages and obtaining a settlement. *Id.* at 90-91. Finally, a great amount of time and resources are required to deter-a change would alleviate many of the allegations of unfairness which prompted the contribution debate and, unlike contribution, would not require legislative implementation. Moreover, the proposed change would achieve a satisfactory balance between the need to encourage private enforcement of the antitrust laws, which is fostered by the treble damage provision,[9] and the need to use our judicial resources efficiently, which is reflected in the common-law tradition favoring settlements.[10]

AN OUTLINE OF THE PROBLEM

Since antitrust defendants are jointly and severally liable, each coconspirator may be held liable for the entire amount of any judgment.[11] Consequently, should one or more defendants settle

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mine and allocate the damages involved since treble damages induce complicated litigation. *Id.* at 95. For these reasons, an award of treble damages is an economically inefficient method of enforcing the antitrust laws. *Id.* at 96. *See generally* Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy*, 3 N.M.L. REV. 286 (1973).

[9] The civil liability provision of the federal antitrust laws was designed to compensate injured plaintiffs and to deter violations by encouraging the institution of private suits. *See* E.J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 301 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976). *See also* Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972) (primary purpose behind treble damages provision is to encourage plaintiffs to act as private attorneys general).

[10] The number of antitrust actions commenced in the district courts has been increasing steadily. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 61 (1980). Public policy, however, continues to favor the settlement of disputes. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184 (8th Cir. 1979); Lynn v. Southwestern Elec. Power Co., 453 F. Supp. 599, 603 (E.D. Tex. 1978); Gross v. Pennsylvania Mut. Life Ins. Co., 396 F. Supp. 373, 374 (E.D. Pa. 1975); Walther & Cie v. U.S. Fidelity & Guar. Co., 397 F. Supp. 937, 946 (M.D. Pa. 1975); S.E. Rondon Co. v. Atlantic Richfield Co., 288 F. Supp. 879, 881 (C.D. Cal. 1968); Traynor, *Lawsuits: First Resort or Last?*, 1978 UTAH L. REV. 635, 640; Note, *An Analysis of Settlement*, 22 STAN. L. REV. 67, 88 (1969).

[11] *See* note 2 *supra*. Contribution permits a tortfeasor against whom a judgment has been rendered "to recover proportional shares of the judgment 'from other joint tortfeasors whose negligence contributed to the injury and who are liable to the plaintiff.'" Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 718 (2d Cir. 1978) (quoting Dawson v. Contractors Transp. Corp., 467 F.2d 727, 729 (D.C. Cir. 1972)).

Historically, joint tortfeasors were denied a right of contribution. The common-law rule originated with Merryweather v. Nixan, 101 Eng. Rep. 1337, 1337 (K.B. 1799), which prohibited contribution cases involving an intentional tort. Disregarding the distinction between intentional and unintentional wrongs, the early American courts generally relied upon *Merryweather* to deny a right of contribution. *See, e.g.*, Union Stock Yards Co. v. Chicago B. & Q. Ry., 196 U.S. 217, 224 (1905). Thus, the absolute rule against contribution became firmly entrenched in American law. Sullivan, *supra* note 3, at 393; *see* W. PROSSER, *supra* note 2, § 50, at 305. *See generally* Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 130-46 (1932).

with the plaintiff prior to the rendition of a verdict, the remaining defendants would then be liable for the total judgment, less any credit for the settlement.[12] Assume, for example, that a plaintiff sues three defendants for an aggregate of $100,000. During the course of the trial, he settles with two of the defendants for a combined sum of $75,000 and then obtains a verdict of $100,000 against the remaining defendant. Either of the following methods then could be used to calculate liability of the nonsettling defendant.

Under alternative one, the court would treble the $100,000 verdict, thereby arriving at initial damages in the amount of $300,000. It then would deduct the $75,000 settlement, leaving the nonsettling defendant liable for the remaining $225,000. The net recovery to the plaintiff would be $300,000. Method two, however, would require the court to deduct the $75,000 settlement from the $100,000 verdict. It then would treble the remaining amount, resulting in the nonsettling defendant being liable for $75,000. The net recovery for the plaintiff would be $150,000.

Alternative one represents the current law.[13] It serves as a

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Concern over the ability of a plaintiff to choose the person who would bear the entire liability and the possibility that a party might escape liability completely resulted in a general abrogation of the no-contribution rule. *See, e.g.*, CAL. CIV. PROC. CODE § 875 (Deering 1973); MICH. STAT. ANN. § 27A.2925(1) (1980); N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976). An overwhelming majority of states now permit contribution among joint tortfeasors. *See* S. REP. No. 428, 96th Cong., 1st. Sess. 12-13, *reprinted in* [1979] 942 ANTITRUST & TRADE REG. REP. (BNA) Special Supp. 5 (Dec. 6, 1979).

In contrast to the reception accorded the right of contribution, courts have reacted more favorably to the principle of indemnity. Zapico v. Bucyrus-Erie Co., 579 F.2d at 718. Indemnity permits a party against whom a judgment has been rendered to shift his entire liability to another party, who, either by virtue of their relationship or by an express agreement between them, should bear the loss. *Id.* at 718-19. The courts also permitted indemnity of a "passive" tortfeasor by an "active" tortfeasor, thereby placing the burden of the loss on the more guilty party. Wallenius Bremen v. United States, 409 F.2d 994, 998 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970); Chicago Great Western Ry. v. Casura, 234 F.2d 441, 449 (8th Cir. 1956); Slattery v. Marra Bros., 186 F.2d 134, 138-39 (2d Cir.), *cert. denied*, 341 U.S. 915 (1951). Interestingly, the Eighth Circuit held that indemnification may not be allowed among antitrust coconspirators, reasoning that: "a person who violates the antitrust statutes should not be entitled to full indemnification from the more culpable third party." Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1186.

[12] *See* note 11 *supra*. The law purports to disallow double recovery. *See* RESTATEMENT (SECOND) OF TORTS § 885(3) (1979). Thus, if a plaintiff recovers an item of damage from one coconspirator by settlement, he cannot recover the same item from another coconspirator at trial. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971); Baughman v. Cooper-Jarrett Inc., 530 F.2d 529, 533 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976).

[13] *See* Flintkote Co. v. Lysfjord, 246 F.2d 368, 398 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); note 23 and accompanying text *infra*.

strong incentive for defendants to settle. In the case of a small company which believes that it has a meritorious defense or which is a minor participant in the conduct at issue, settlement may be mandatory if it cannot afford to risk incurring treble damage liability based on the entire initial judgment.[14] Furthermore, the first method of calculation effectively encourages plaintiffs to proceed to trial against at least one defendant by providing them with a net recovery after trial which theoretically would be greater than any amount which they otherwise could have obtained by settling with all of the defendants. Somewhat paradoxically, therefore, the current law encourages partial settlements while discouraging total ones.

Alternative two also retains the incentive for defendants to settle because a nonsettling defendant remains potentially liable for triple the damages remaining once the settlement has been deducted in addition to his liability for the plaintiff's attorney's fees. The second option, however, would ease the heavy pressure on a small defendant to settle for more than its fair share of liability.[15] It also drastically weakens the existing incentive for a plaintiff to refuse a full settlement offer and go to trial against one of the defendants. Since the antitrust laws were not intended to discourage settlements, this result presents a strong argument in favor of adopting the second option. The plaintiff still would be protected, however, since he would receive full damages in any event. Should the case progress to trial, the plaintiff would receive the benefit of the trebling provision plus his attorney's fees. Moreover, while the nonsettling defendant is the one at whose expense the damages are trebled, at least, under this option, the punishment bears a closer relationship to the magnitude of the harm caused by him.

THE GENESIS OF CURRENT LAW—FLINTKOTE CO. v. LYSFJORD

In 1957, the Ninth Circuit Court of Appeals, in *Flintkote Co.*

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[14] S. REP. No. 428, 96th Cong., 1st Sess. 15 (1979); Note, *Contribution Among Antitrust Violators*, 29 CATH. U.L. REV. 669, 681 (1980); *see* Sullivan, *supra* note 3, at 416. *But see* Note, *Contribution For Antitrust Codefendants*, 66 VA. L. REV. 797, 814-15 (1980). When the amount of the settlement is deducted from the final treble damages assessed, the nonsettling defendants, in effect, are held liable for the settling defendants illegal activities. *See* Wainwright v. Kraftco Corp., 58 F.R.D. 9, 12 (N.D. Ga. 1973). Thus, the settlement "forced" on a small company may be comparatively larger than that negotiated with a larger organization. *See Contribution Among Antitrust Violators, supra*, at 681. *But see* Easterbrook, Landes & Posner, *supra* note 3, at 343-44.

[15] *See* note 14 *supra*.

v. Lysfjord,[16] prescribed the current method of adjusting judgments to reflect prior settlements. *Flintkote* involved an action for damages against a tile supplier who allegedly had joined an existing conspiracy among tile contractors to restrain trade in acoustical tile. After the commencement of the action, but prior to the trial, the plaintiffs executed a covenant not to sue with certain named coconspirators other than Flintkote.[17] Pursuant to the terms of the agreement, the plaintiffs discontinued their action against the cocovenantees in exchange for the sum of $20,000, but expressly reserved all of their rights against Flintkote. The case proceeded to trial and the jury found in favor of the plaintiffs, setting the actual damages at $50,000.

The *Flintkote* court was confronted with the issue whether the $20,000 settlement should be subtracted from the actual damages of $50,000 before they were trebled or whether the damages award should be trebled before deducting the $20,000 settlement. The first method would yield a $90,000 judgment, whereas the latter method would result in a judgment of $130,000.

Treating the issue as one of first impression, the *Flintkote* court interpreted section 4 of the Clayton Act as requiring that the jury award be trebled. While acknowledging that the plaintiffs were entitled to only one satisfaction of their claim, the court decided that their claim was equivalent to treble the amount of actual damages. Accordingly, it held that the settlement should be deducted from the trebled amount. The *Flintkote* court offered three policy arguments in support of its conclusion. First, "[i]n the case of punitive damages joint tortfeasors are liable for the entire amount, not merely the compensatory part."[18] Since the extra double damages under the antitrust laws clearly are punitive, the same reasoning should apply.[19] Second, a restrictive construction of the treble damage provision would violate the clear intent of

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[16] 246 F.2d 368, 397-98 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

[17] 246 F.2d at 397. Historically, the release of one joint tortfeasor relieved other joint tortfeasors of liability. *See* W. PROSSER, *supra* note 2, § 49. To avoid this result, an injured party would covenant not to sue the settlor rather than release him from liability, thereby preserving the plaintiff's cause of action against the nonsettling joint tortfeasors. *Id.* § 49, at 303. In antitrust cases, however, the effect of a release depends upon the intention of the parties. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 342-46 (1971). The covenant not to sue, therefore, is no longer necessary to preserve the plaintiff's cause of action against nonsettling antitrust defendants.

[18] 246 F.2d at 398.

[19] *Id.*

Congress in creating the private antitrust action as a means of deterring unlawful business practices.[20] "Moreover, a contrary result would put a premium on litigation and discourage settlements."[21] With the exception of *Telex Corp. v. IBM*,[22] subsequent cases simply have applied the *Flintkote* rule without subjecting it to critical scrutiny.[23] The *Telex* court, however, further refined the *Flintkote* rationale.

In *Telex*, the plaintiff accused IBM of monopolizing certain markets and IBM counterclaimed based upon the alleged misappropriation of trade secrets.[24] The district court found both claims to be valid.[25] The plaintiff's damages included the amount of sales which it would have made were it not for the antitrust violation. A mindless application of *Flintkote* would have resulted in the trebling of this amount and the subsequent deduction of the amount which IBM had been awarded on its counterclaim. The *Telex* court noted, however, that a portion of the plaintiff's lost sales would have been attributable to its unlawful use of IBM's trade secrets.

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[20] *Id.*

[21] *Id.*

[22] 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd in part on other grounds,* 510 F.2d 894 (10th Cir.) (per curiam), *cert. dismissed,* 423 U.S. 802 (1975).

[23] In Bal Theatre Corp. v. Paramount Film Distrib. Corp., 206 F. Supp. 708 (N.D. Cal. 1962), the owner of a single movie theatre sued a chain of theatres for restraint and monopolization of trade. The court noted that "[a]long with *Flintkote* . . . these cases indicate that where the law has a punitive purpose in multiplying the compensatory damages, such as in the antitrust laws . . . any set offs, or deductions, from the judgment must be made after the compensatory damages are multiplied . . . that the punitive purpose of the law will not be frustrated." *Id.* at 716. *See* Hydrolevel Corp. v. ASME, Inc., [1980-81] Trade Cases (CCH) ¶ 63,651 (2d Cir. 1980); Baughman v. Cooper Jarrett, Inc., 530 F.2d 529, 534 (3d Cir. 1976); Wainwright v. Kraftco Corp., 58 F.R.D. 9, 12 (N.D. Ga. 1973); Semke v. Enid Auto. Dealers Ass'n, 320 F. Supp. 445, 447 (W.D. Okla. 1970), *rev'd in part on other grounds,* 456 F.2d 1361 (10th Cir. 1972); Jerard Assocs. v. Stanley Works, [1966] Trade Cases (CCH) ¶ 71,820 (S.D.N.Y. 1966). Indeed, until recently, the *Flintkote* method had "survived without serious challenge" and had slippped by "quietly accepted" without question. Salzman, *supra* note 7, at 1594.

[24] 367 F. Supp. at 267. In 1966, Telex began manufacturing certain plug compatible peripheral devices for electronic data-processing equipment. These devices were substantially similar to the IBM models, but were priced lower. *Id.* at 270. Since Telex was acquiring a portion of the IBM market, IBM retaliated in 1970 with a program designed to impede Telex's growth in this area. *Id.* at 293-95. Telex accused IBM of five specific acts which allegedly constituted monopolization of trade. *See id.* at 267-68. IBM's counterclaim asserted that Telex had misappropriated trade secrets by placing former IBM employees who were capable of developing Telex technology in peripherals on the basis of IBM design in key positions. *Id.* at 313, 315-16.

[25] *Id.* at 363-65. The court of appeals upheld IBM's misappropriation counterclaim, but reversed the lower court's decision on Telex's claim. 510 F.2d 894, 933 (10th Cir. 1975).

Observing that "damages cannot be recovered for detriment not based up on the violation of legal rights," the court deducted the amount of lost sales which would have been obtained through the misappropriation of plaintiff's trade secrets from the antitrust damages before trebling them.[26]

Although the *Telex* court engaged in a perceptive analysis of the problem presented, it did not take its rationale far enough. Had the court done so, it would have rejected the entire *Flintkote* rationale. Indeed, a critical examination of the policy arguments advanced by the *Flintkote* court reveals that they do not support its conclusion.

THE FLAWS IN *Flintkote*

The Theoretical Unity of Joint Tortfeasors

The *Flintkote* court found significance in the fact that a joint tortfeasor is liable for the entire amount of damages sustained by an injured party—both compensatory and punitive.[27] This statement, however, no longer is entirely accurate. Although the cases almost uniformly hold that compensatory damages may not be apportioned among joint tortfeasors,[28] the courts disagree over whether there may be an apportionment of punitive damages.[29] The more recent cases apparently indicate a trend toward allowing such apportionment on traditional equitable grounds.[30]

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[26] 367 F. Supp. at 353.

[27] 246 F.2d at 398; *see* notes 2 & 11-12 and accompanying text *supra*.

[28] *See, e.g.*, Wrabek v. Suchomel, 145 Minn. 468, 474, 177 N.W. 764, 766 (1920); Oliver v. Miles, 144 Miss. 852, 857, 110 So. 666, 668 (1926); Garrett v. Garrett, 228 N.C. 530, 532, 46 S.E.2d 302, 302 (1948). *See also* W. PROSSER, *supra* note 2, § 52, at 314-15.

[29] For cases where punitive damages were held to be apportionable, see Thomson v. Catalina, 205 Cal. 402, 405-06, 271 P. 198, 200 (1928); Nelson v. Halvorsun, 117 Minn. 255, 260, 135 N.W. 818, 819 (1912); Edquest v. Tripp & Dragstedt Co., 93 Mont. 446, 455, 19 P.2d 637, 640 (1933); Mahanna v. Westland Oil Co., 107 N.W.2d 353, 359 (N.D. 1960); McCurdy v. Hughes, 63 N.D. 435, 450, 248 N.W. 512, 520 (1933); Moore v. Duke, 84 Vt. 401, 408, 80 A. 194, 197 (1911). For cases reaching the opposite conclusion, see Bowman v. Lewis, 110 Mont. 435, 440, 102 P.2d 1, 3 (1940), *overruled on other grounds*, Fauver v. Wilkoske, 123 Mont. 228, 234, 211 P.2d 420, 426 (1949); Leach v. Helm, 114 Or. 405, 415, 235 P. 687, 690 (1925). *See generally* Note, *Apportionment of Punitive Damages*, 38 VA. L. REV. 71 (1952).

[30] *See* Davidson v. Dixon, 386 F. Supp. 482, 489-90 (D. Del. 1974), *aff'd mem.*, 529 F.2d 511 (3d Cir. 1975); Cheek v. J.B.G. Properties Inc., 28 Md. App. 29, 43-44, 344 A.2d 180, 190 (Ct. Spec. App. 1975); Mahanna v. Westland Oil Co., 107 N.W.2d 353, 359 (N.D. 1960); Vickrey v. Dunivan, 59 N.M. 90, 94, 279 P.2d 853, 856 (1955); Huckeby v. Spangler, 563 S.W.2d 555, 560 (Tenn. 1978).

To the extent that the courts permit the apportionment of punitive damages, the theoretical unity of joint tortfeasors is destroyed. Once that unity has been broken, there is no logical or historical compulsion to retain the *Flintkote* rule. Current law does not prevent one antitrust defendant from settling and thus avoiding the possibility of incurring punitive damage liability at trial. It also does not mandate that a nonsettling defendant be held accountable for the full amount of punitive damages which might have been assessed against all of the defendants had they all gone to trial.[31] *Flintkote,* therefore, cannot be justified on this ground.

The Violation of a Clear Congressional Intent

The argument that a restrictive construction of the treble damage provision would violate the congressional intent also is disputable. While one of the most revolutionary aspects of the Sherman Act was the creation of a private right of action producing a recovery of treble damages,[32] an examination of the legislative history of the Act does not indicate how Congress intended the treble damage provision to operate.[33] The most significant aspect of the Act was that it granted an aggrieved plaintiff standing to sue in federal court. As Senator Sherman explained:

> [T]his provision allowing any party to sue is of importance. Why, sir, I know of one case where a man in good circumstances, a thrifty, strong, healthy American, was engaged in this kind of competition. He was met in just the way I have mentioned. If he had the right to sue this company in the courts of the United

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[31] *See* note 30 and accompanying text *supra*. The treble damage provision in the Clayton Act is punitive in nature.

[32] Section 7 of the Sherman Act originally provided that:

> Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) (current version at 15 U.S.C. § 15 (Supp. IV 1980)).

Congress had a dual purpose in establishing a private cause of action for antitrust violations. The "person" who has suffered injury was granted redress. In addition, "the feature of self-enforcement that had been typical in cases of restraint of trade at common law" was incorporated into the Act. H. THORELLI, THE FEDERAL ANTITRUST POLICY 225 (1954); *see* E. TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS §§ 3.01-.02 (1965).

[33] *See* note 1 *supra*.

> States under this section he would have been able to indemnify himself for the losses that he suffered. I have known of other cases of the kind. Sometimes the damages would be too slight to give the courts of the United States jurisdiction.
>
> . . . .
>
> [U]nder these circumstances, it is important to citizens that they should have some remedy in a court of general jurisdiction in the United States to sue for and recover the damages they have suffered.[34]

Research does not disclose any discussion of when the courts were to ascertain the damages to be multiplied.[35] When section 7 of the Sherman Act was replaced by the current damage provision,[36] the only change related to venue.[37] Despite the somewhat meager legislative history surrounding the treble damage provision, one point is clear: Congress never addressed the question of whether damages should be trebled before or after deducting settlements.[38] The issue presented, therefore, is whether the abandonment of the *Flintkote* rule would discourage private plaintiffs from bringing suits to such an extent that the deterrence provided by

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[34] 21 CONG. REC. 2569 (1890) (remarks of Sen. Sherman).

[35] On August 14, 1888, Senator Sherman introduced his first antitrust bill which authorized recovery of twice the amount of damages suffered by any person or corporation injured as a result of antitrust activities. 1 E. KINTNER, FEDERAL ANTITRUST LAW § 4.3, at 142 (1980). The final version of the bill adopted by the Senate on April 1, 1890 provided for recovery of treble damages. *Id.* § 4.12, at 201.

[36] Clayton Act, § 4, 15 U.S.C. § 15 (1976), *as amended by* Act of Sept. 12, 1980, Pub. L. No. 96-349, § 4(a)(1), 94 Stat. 1156 (original version at ch. 323, § 4, 38 Stat. 731 (1914)).

[37] *See* H.R. 15657, 63rd Cong., 2d Sess., 51 CONG. REC. 9414-17, 9466-67 (1914).

[38] Although Congress never addressed the issue as to when damages should be trebled, it could be argued that since Congress amended the antitrust laws generally after *Flintkote*, without reversing the rule of that case, it has adopted that rule. This, however, would be an erroneous assumption. Although some cases contain loose language indicating that a failure by Congress to amend a statute after judicial construction is evidence of congressional adoption of that construction, the Supreme Court recently put that view to rest. United States v. Board of Comm'rs, 435 U.S. 110, 135 (1978). In *Board of Commissioners*, the Court held that Congress had adopted the Attorney General's administrative construction of the Voting Rights Act. *Id.* at 135. Congress, however, had reenacted the statute twice and manifested its agreement with the construction. *Id.* Thus, the Court noted, the proper rule is that when Congress reenacts a statute and voices approval of its existing construction, it is held to have adopted that construction. *Id.* at 134-35. No inference, however, can be drawn from congressional inaction. *See* NLRB v. Plasterers' Union, Local 79, 404 U.S. 116, 129-30 (1971); Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 241 (1970). Where, as here, Congress has not amended, enacted or even addressed the basic treble damage provision and its application to settlements, there simply is no reason to believe that Congress accepted the *Flintkote* approach.

their suits would be eroded.[39] It is highly unlikely that such a result would occur. Without *Flintkote,* should a plaintiff settle before trial, he will receive the bargained-for estimate of his damages.[40] If a plaintiff is unable to obtain a global settlement and must go to trial against some defendants, he still may recover his attorney's fees and the trebled damages remaining in the case. It is difficult to imagine how such a package of incentives could prove insufficient to induce a plaintiff to prosecute a meritorious case.[41] It, however, might lessen the currently irresistible temptation to bring all such cases to trial.[42]

Moreover, the argument that a restrictive construction of the

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[39] The private action sanctioned by the Clayton Act, 15 U.S.C. § 15 (1976 & 1981 Supp.), has gained increasing importance as an enforcement mechanism. *See* ABA, ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 254 (1975). In Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), the Supreme Court stated "that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Id.* at 139. *See* Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975); Shelter Realty Corp. v. Allied Maintenance Corp., 75 F.R.D. 34, 38 (S.D.N.Y. 1977), *appeal dismissed,* 574 F.2d 656 (2d Cir. 1978). Similarly, treble damages are used to encourage private suits and to effectuate efficient administration of the antitrust laws by acting as a deterrent against future antitrust violations. E. TIMBERLAKE, *supra* note 29, § 3.01. Several factors, however, tend to mitigate the deterrent effect of the treble damages provision. These include, for example, the tax treatment received by a corporate defendant who has been found guilty in a private suit. Unless there was a prior criminal conviction or a plea of guilty or nolo contendere on the same set of facts, a corporate defendant is entitled to deduct the full amount of any settlement or judgment as a business expense. Even when there has been a criminal conviction, one-third remains deductible. Finally, interest also is excluded from antitrust damage computations. Wheeler, *Antitrust Treble-Damage Actions: Do They Work?,* 61 CALIF. L. REV. 1319, 1322-23 (1973). *See also* Blair, *Antitrust Penalties: Deterrence and Compensation,* 1980 UTAH L. REV. 57, 61-62; Parker, *Treble Damage Action—A Financial Deterrent to Antitrust Violations?* 16 ANTITRUST BULL. 483, 486-501 (1971).

[40] A plaintiff who settles before trial will receive the bargained-for estimate of his damages reduced by the evaluation of litigation risk. To oversimplify slightly, if a plaintiff has a claim for $100,000 in actual damages and believes that he has a 70% chance of prevailing at trial, he will accept approximately $70,000 in settlement. Obviously, this view assumes a settlement based on single damages, not treble. This actually is the way the vast majority of antitrust settlements are negotiated. Although it is not possible to cite case law for this proposition, the author's own experiences leave him with no doubt of its validity. *See also* Halper, *The Unsettling Problems of Settlement in Antitrust Damage Cases,* 32 A.B.A. ANTITRUST L.J. 98, 99 (1966) (settlements usually compensate injured party for 50% of actual damages at one extreme and total actual damages plus litigation costs at other).

[41] *See* text accompanying notes 44-45 *infra.* Note that the antitrust statute originally provided double damages, *see* note 1 *supra.* By increasing the provision to treble, one could argue that Congress set an absolute maximum on the incentive it meant to offer. *See* text accompanying notes 60-61 *infra.*

[42] *See* note 10 *supra.*

treble damage provision would inhibit congressional intent is deficient because it admits of no limitations. Under this line of reasoning, any limitation on a private antitrust plaintiff could be attacked on the ground that it frustrates the prosecution of private actions. When taken to its logical conclusion, only the *per se* liability of all possible defendants for the maximum amount of damages would satisfy this argument. Clearly, however, limitations have been placed on antitrust plaintiffs which do not frustrate the congressional intention to rely on private enforcement.[43]

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[43] Since it is "not a means of enforcing the law by common informers," the private action treble damages remedy only is available to those plaintiffs who meet the section 4 standing requirements. A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 388 (1960); *see* Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 (1972). To have standing, a plaintiff must show an injury to a business or property interest which occurred "by reason of" the antitrust violation. Selinger v. A&M Records, Inc., 586 F.2d 1304, 1309 (9th Cir. 1978), *cert. denied,* 441 U.S. 908 (1979). In addition to preventing excessive litigation, one purpose of the standing requirement is to prohibit the "in terrorem use [of the treble recovery provision] by plaintiffs having speculative claims or seeking windfall recoveries." Laurie Visual Etudes, Inc. v. Chesebrough-Pond's, Inc., 473 F. Supp. 951, 955 (S.D.N.Y. 1979). In establishing the contours of this standing requirement, the courts have found that the treble damage windfall to the business or property of a corporation will not extend to a stockholder who is damaged by the reduction in the value of his stock attributable to the antitrust violation. Such damages are considered "indirect" and too tenuous to be sustained. Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910). Consistently, courts have applied *Loeb's* "direct injury" standard to deny shareholders standing to sue on their own behalf. Berger & Bernstein, *An Analytical Framework for Antitrust Standing,* 86 YALE L.J. 809, 815 n.19 (1977); *see, e.g.,* Pitchford v. Pepi, Inc., 531 F.2d 92, 97 (3d Cir. 1975), *cert. denied,* 426 U.S. 935 (1976). *See also* E. TIMBERLAKE, *supra* note 32, § 4.04.

The situation of a plaintiff who has been prevented from establishing a new business or entering an industry presents special standing problems. Some courts have held that such a plaintiff cannot establish that it has a concrete business or property interest that can be injured. *See, e.g.,* Duff v. Kansas City Star Co., 299 F.2d 320, 323 (8th Cir. 1962). A number of courts, however, grant standing to a plaintiff who has taken demonstrable steps to undertake a business or penetrate an industry. The plaintiff must show that it had the "intention and preparedness to engage in business." Laurie Visual Etudes, Inc. v. Chesebrough-Pond's, Inc., 473 F. Supp. at 955 (quoting American Banana Co. v. United Fruit Co., 166 F. 261, 264 (2d Cir. 1908), *aff'd,* 213 U.S. 347 (1909)); *see* Solinger v. A&M Records, Inc., 586 F.2d 1304, 1309-10 (9th Cir. 1978), *cert. denied,* 441 U.S. 908 (1979); Hecht v. Pro-Football, Inc., 570 F.2d 982, 994 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 956 (1978); Quinonez v. National Ass'n of Sec. Dealers, Inc., 540 F.2d 824, 830 (5th Cir. 1976). Furthermore, plaintiffs' efforts to show standing to sue "are done in a milieu of case law that has not attained high analytical rigor or predictability. It involves drawing a line somewhere in the cause-effect relationships of an interdependent economy." K. ELZINGA & W. BREIT, *supra* note 1, at 69 (footnote omitted). *See generally* Arnold, *Implied Right of Action Under the Antitrust Laws,* 21 WM. & MARY L. REV. 437 (1979); Eiger, *Evolving Concepts of Antitrust Inquiry,* 61 CHI. B. REC. 54 (1979).

The Discouragement of Settlements

The third reason for the adoption of the *Flintkote* rule was that a contrary result would discourage settlements and foster litigation. The court simply stated this reason without offering an explanation. Deducting the settlement before trebling the damages, however, apparently would encourage settlements and discourage continued litigation.

If a plaintiff settled with all of the defendants, he would recover only his compensatory damages.[44] Under the current law, if there has been a partial settlement, the plaintiff has an enormous incentive to go to trial for the remainder and reject any further settlement attempts. For example, assume a plaintiff has sustained \$100,000 in damages and has arranged settlements with some of the defendants totalling \$75,000. If he completes the settlement, he can obtain another \$25,000. Although he presently is at risk for \$25,000, he has an enormous incentive to continue on to trial. If he wins, he will receive an additional \$225,000, his attorney's fees, and costs. Actually, this amounts to more than treble damages since the remaining damages are nonupled. Thus, the risk multiplier is a factor of nine.[45]

The repeal of *Flintkote* would encourage total settlement by reducing this exorbitant premium for litigation. Under the above example, the plaintiff has obtained \$75,000 through a settlement and is at risk for the remaining \$25,000 in damages. If he were to win under the proposed rule he would receive an additional \$75,000, attorney's fees and costs. He therefore pockets a total of \$150,000—which more than compensates him for his loss despite the reduction of the multiplier to a factor of three.[46]

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[44] *See* note 41 *supra*. The compensatory damages would be reduced by the amount of the litigation risk.

[45] The net multiple is greater than three with respect to smaller settlements. Assume, for example, that a plaintiff sustains initial damages of \$100,000, settles with a defendant for \$25,000 and is at risk for \$75,000. If the plaintiff wins, he will receive $\$100,000 \times 3 = \$300,000 - \$25,000 = \$275,000$ which is 3.66 times the amount at risk.

A more subtle question is whether removing *Flintkote* would limit or discourage the present practice of settlements based on single damages. Obviously, a plaintiff who sees a smaller pot of gold at the end of the litigation rainbow may demand more in initial settlements. A defendant, however, who sees his ultimate liability exposure reduced may not be willing to satisfy the higher demand. This should not present a problem since the trial is sufficiently unpredictable to make the settlement alternative attractive within a broad range of dollar amounts. Any limiting effect which the repeal of *Flintkote* would have on the settlements would be minimal.

[46] Whenever the plaintiff wins under the proposed rule, he receives three times the

CURRENT PROPOSALS SUPPORTING CHANGE

It is the central thesis of this Article that the courts should temper the windfall aspect of the current doctrine of joint and several liability under the antitrust laws by deducting the amount of any settlement from the verdict before trebling the remainder. Recent proposals in the area of contribution for antitrust defendants also have addressed this issue and would alter the *Flintkote* rule by allowing a more equitable deduction of settlements.[47] It appears, however, that these schemes arguably may require legislative implementation.[48] Elimination of *Flintkote*, however, need not await congressional action. The *Flintkote* rule was a judicial creation and, as such, can be abandoned by the courts themselves.[49] Nevertheless, an examination of these proposals will serve to illuminate the tenuous nature of the policy reasons underlying *Flintkote*.

The first proposal is the Antitrust Equal Enforcement Act of 1979 introduced by Senator Bayh.[50] This bill would allow contribu-

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amount at risk. Suppose, for example, the plaintiff sustains initial damages of $100,000, settles with one defendant for $25,000 and is at risk for the remaining $75,000. Should he prevail at trial, the plaintiff would receive treble the amount at risk or $225,000.

[47] *See* notes 50-56 and accompanying text *infra*.

[48] The decision in Texas Indus., Inc. v. Radcliff Materials, Inc., 101 S. Ct. 2061 (1981), *see* note 4 *supra*, apparently precludes the adoption of alternative contribution proposals because they would require some allocation of fault. *See* notes 50-56 *infra*. In *Texas Industries*, the Court stated:

> Dividing or apportioning damages among a cluster of co-conspirators presents difficult issues, for the participation of each in the conspiracy may have varied. . . . Some *amici* and commentators have suggested that the total amount of the plaintiff's claim should be reduced by the amount of any settlement with any one co-conspirator; others strongly disagree. Similarly, vigorous arguments can be made for and against allowing a losing defendant to seek contribution from co-conspirators who settled with the plaintiff before trial. Regardless of the particular rule adopted for allocating damages or enforcing settlements, the complexity of the issues involved may result in additional trial and pretrial proceedings, thus adding new complications to what already is complex litigation.

101 S. Ct. at 2065 (citations omitted).

[49] Being "judge-invented," the *Flintkote* doctrine may be "judge-destroyed." H. ABRAHAM, THE JUDICIAL PROCESS 345-46 (4th ed. 1980) (quoting Montgomery v. Stephan, 359 Mich. 33, 49 (1960)). Indeed, the "reconsideration of a prior decision, [often], is absolutely essential to the even administration of justice." Bookman v. United States, 453 F.2d 1263, 1265 (Ct. Cl. 1972). There is no question of the courts' ability to undo a rule they created; "from the beginning [the Supreme Court has] rejected a doctrine of disability at self-correction." Helvering v. Hallock, 309 U.S. 106, 121 (1940). *See generally* Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949).

[50] *Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcommittee on Antitrust, Monopoly and Business Rights of the Senate Judiciary Committee,*

tion in antitrust price-fixing suits.[51] Section 4I(b) of the bill expressly departs from the *Flintkote* doctrine by permitting a reduction of the plaintiff's claim by the greatest of three possible amounts—one amount being treble the actual damages attributable to the market share of the settling party.[52] This claim reduction device would relieve the nonsettling defendants of the liability attributable to the settlor's sales or purchases of the good or service whose price had been fixed.[53]

The American Bar Association (ABA) also has structured a contribution bill which achieves a similar result through an alternative procedure.[54] Following a settlement, section (f) of the proposed bill permits the plaintiff to reduce his claim by withdrawing from suit all of the claims based on the acts or omissions of the settlors. If the plaintiff does not withdraw those claims, the court

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96th Cong., 1st Sess. 123 (1979) [hereinafter cited as *Hearings on S. 1468*]; *see* SENATE COMM. ON THE JUDICIARY, REPORT ON THE EQUAL ENFORCEMENT ACT OF 1979, S. REP. No. 96-428, 96th Cong., 1st Sess. 1 (1979) *reprinted in* [1979] 942 ANTITRUST & TRADE REG. REP. (BNA) Special Supp. 2 (Dec. 6, 1979) [hereinafter cited as S. REP. No. 96-428]. Initially, the Bayh bill was proposed as an amendment to Senate bill S. 390, 96th Cong., 1st Sess., 125 CONG. REC. 8931 (1979), in May 1979. *See Proposed Antitrust Procedural Act of 1979: Hearings on S. 390 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, 96th Cong., 1st Sess. 131 (1979). Subsequently, however, the amendment was withdrawn and reintroduced as a separate bill, S. 1468, in July 1979. *See* S. REP. No. 96-428, *supra*. Although the bill was not enacted, an identical bill was introduced by Representative Brooks in 1981. *See* H.R. 1242, 97th Cong., 1st Sess., 127 CONG. REC. 189 (1981).

[51] *See Hearings on S. 1468, supra* note 50, § 4I(a), at 123-24. S. 1468 would have allowed contribution solely in actions for price-fixing violations brought under sections 4, 4(A), and 4(C) of the Clayton Act. *See Hearings on S. 1468, supra* note 50, § 4I(e), at 125.

[52] Section 4I(b) of S. 1468 provided for a reduction of the plaintiff's claim by the greatest of (1) any amount stipulated by the release or covenant; (2) the amount of consideration paid for the release; or (3) treble the actual damages attributable to the settlor's sales or purchases of the price-fixed goods or services. *Hearings on S. 1468, supra* note 50, § 4I(b), at 124. Although this provision is not a pure reversal of *Flintkote*, it definitely evinces an intention to treat deductions of settlements more equitably than the present judicially created rule. The adoption of market-share liability instead of relative fault apparently was done to lessen judicial burdens. *See* S. REP. No. 96-428, *supra* note 50, at 1-2, 22 n.7. The set-off procedure, however, has been characterized as requiring some determination of fault, *see* Ponsoldt & Terry, *supra* note 4, at 335-36, or at a minimum, an examination of the causal factors of relative sales or purchases by each violator. *See* Sullivan, *supra* note 3, at 415. Arguably, therefore, the proposal requires legislative implementation.

[53] *Hearings on S. 1468, supra* note 50, § 4I(b)(3), at 124. The Bayh proposal also included an immunity clause whereby settling defendants would be free from contribution claims. *See Hearings on S. 1468, supra* note 50, § 4I(c).

[54] AMERICAN BAR ASSOCIATION, SECTION ON ANTITRUST LAW, RESOLUTIONS AND REPORT ON PROPOSED AMENDMENT OF THE CLAYTON ACT TO PERMIT CONTRIBUTION IN DAMAGES ACTIONS BROUGHT THEREUNDER (Aug. 17, 1979), *reprinted in* [1979] 936 ANTITRUST & TRADE REG. REP. (BNA) E-1, E-2 to E-3 (Oct. 25, 1979) [hereinafter cited as ABA PROPOSAL].

would reduce any judgment for plaintiff by the amount which the settling defendants would have been liable for in contribution had there been no settlement.[55] The ABA proposal deviates from *Flintkote* in allowing the plaintiff to withdraw from the case all claims based on the acts or omissions of the settling defendant. Thus, in effect, the relative culpability of the settlor would be measured and the damages attributable to him deducted before the verdict and consequent trebling of the remaining damages. Additionally, the bill employs a variation of the Bayh technique but reaches the same result. It reduces the plaintiff's net recovery by the amount of the settlor's hypothetical contribution liability after judgment. The settling defendant's liability for contribution, however, would be determined after trebling the amount of the plaintiff's recovery. Consequently, the plaintiff would obtain a judgment for the entire amount which would be trebled before deducting the trebled damages applicable to the settling defendant. Both Senator Bayh's bill and the ABA proposals, therefore, expressly repudiate the result reached through an application of the *Flintkote* rule.[56]

An evaluation of the various contribution proposals is beyond

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[55] Section (f) of the ABA PROPOSAL provides:

> Following a settlement in the action in respect of which contribution rights are claimed with less than all defendants, the plaintiff may, within sixty (60) days of the settlement, elect to withdraw from the damage action all claims based upon the acts or omissions of the settling person or persons. Failing such an election by plaintiff, the court shall reduce any judgment by the amount for which each settling defendant would have been liable for contribution had there been no settlement.

ABA PROPOSAL, *supra* note 54, § (f), at E-3.

[56] S. 1468 differs in several major respects from the ABA proposal. First, S. 1468 limits contribution to horizontal price-fixing cases. S. REP. No. 96-428, *supra* note 50, at 3. The ABA proposal, on the other hand, would establish a basic right to contribution in all antitrust damage actions where one party may be held liable for the wrongful conduct of another. ABA PROPOSAL, *supra* note 54, at E-3. Second, S. 1468 would allow a claim for contribution against any participant in an agreement to fix, maintain or stabilize prices, S. REP. No. 96-428, *supra* note 50, at 3, while the ABA proposal would limit the number of possible defendants to only those persons named in the plaintiff's complaint, *see* ABA PROPOSAL, *supra* note 54, at E-3. Third, S. 1468 permits a contribution claim by a settling defendant who has paid more than his allocated share to the plaintiff against a nonsettling defendant, S. REP. No. 96-428, *supra* note 50, at 3, while the ABA proposal would prohibit such a claim, *see* ABA PROPOSAL, *supra* note 54, at E-3. Finally, the ABA proposal provides a statute of limitations for contribution claims. Specifically, claims are barred unless they are filed within 1 year of the service date of the original complaint or within 60 days after the claimant for contribution receives reasonable notice of his liability or potential liability. ABA PROPOSAL, *supra* note 51, at E-3. S. 1468 contains no such statute of limitations. S. REP. No. 96-428, *supra* note 50, at 3-4.

the scope of this Article.[57] Significantly, however, both proposals entail an abandonment of the *Flintkote* rationale.[58] This strongly suggests that the policy reasons underlying the rule have been undermined, if indeed they were valid in the first instance.

ARGUMENTS FAVORING CHANGE

When advocating a particular construction of a federal statute, the touchstone obviously is the congressional intent.[59] Yet, Congress apparently never focused on the problem of deducting settlement amounts from treble damage awards.[60] It undoubtedly included the multiple damages provision to encourage private suits, but there is absolutely nothing in the legislative history which suggests that Congress "meant" to impose ninefold damages or more when some defendants settled prior to the judgment.[61] Since the current law does just that, it arguably is not effectuating the intent of Congress. Changing the *Flintkote* rule, therefore, would not frustrate the congressional purpose in enacting the treble damage provision.

Moreover, it is a settled rule of law that there can be but one recovery for any element of damage.[62] Indeed, in discussing the ef-

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[57] Although it is not the purpose of this Article to evaluate the various contribution proposals, it should be noted that both S. 1468 and the ABA proposal may provide more equitable methods of deducting settlements in antitrust actions. Both proposals, however, may not be viable alternatives unless legislatively implemented.

[58] Because both proposals would move beyond the *Flintkote* rule by ascertaining the damages caused by the settlor, neither S. 1468 nor the ABA proposal is a pure reversal of *Flintkote.*

[59] Statutory interpretation must serve the legislative purpose. AFL-CIO v. Marshall, 570 F.2d 1030, 1036 (D.C. Cir. 1978). "[E]ven the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (citation omitted); *accord,* Reporters Comm. for Freedom of the Press v. Sampson, 591 F.2d 944, 948 (D.C. Cir. 1978); Taray v. Moldovanyi, 478 F. Supp. 1120, 1122 (E.D.N.Y. 1979); UPS v. United States Postal Serv., 455 F. Supp. 857, 865 (E.D. Pa. 1978), *aff'd,* 604 F.2d 1370 (3d Cir. 1979), *cert. denied,* 100 S. Ct. 2929 (1980); *see* Neuberger v. Commissioner, 311 U.S. 83, 88 (1940); *cf.* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16, 23-24 (1979) (implication of private right of action turns on congressional intent); Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979) (central inquiry is congressional intent).

[60] *See* text accompanying notes 35-38 *supra.* Neither the Sherman Act nor Clayton Act addresses the problems raised by the issue of liability among multiple antitrust coconspirators. For a detailed summary of the legislative history of the Sherman Act, see 1 E. KINTNER, *supra* note 35, §§ 4.1-.18 (1980).

[61] *See* text accompanying note 45 *supra.*

[62] A "cardinal" principle of law is that "[w]here there has been only one injury, the law confers only one recovery, irrespective of the multiplicity of parties whom or theories which

fect of a purported release of an antitrust violator, the Supreme Court has noted that, "entirely apart from any release, a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator; the law, that is, does not permit a plaintiff to recover double payment."[63] When this observation is juxtaposed with the statement in *Telex* that a plaintiff recovers treble damages only for a violation of his legal rights,[64] it becomes clear that the problem posed in *Flintkote* necessitates an inquiry into the theoretical underpinnings of legal rights.

Normally, the right to damages is coextensive with liability for those damages. The legal right to damages is extinguished by a settlement because the settlement also extinguishes liability for those damages. Obviously, this is true when the entire case has been settled and it is equally true when there has been only a partial settlement.[65] Accordingly, the applicable rule should be that a plaintiff who recovers $75,000 in settlement of a $100,000 claim thereby extinguishes his right to demand that $75,000 at trial. Since there remains only a $25,000 claim only that amount should be trebled after trial. Implicit, however, in the *Flintkote* rule is the assumption that the right to damages subsists even after the liability for those damages has been removed.[66] Under this approach, the

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the plaintiff pursues." Kassman v. American Univ., 546 F.2d 1029, 1033-34 (D.C. Cir. 1976) (footnote omitted). *See also* Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp., 453 F.2d 552, 554 (2d Cir. 1972); Snowden v. D.C. Transit Sys., Inc., 454 F.2d 1047, 1048 (D.C. Cir. 1971); Lovejoy v. Murray, 70 U.S. (3 Wall.) 1, 17 (1865).

[63] Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971) (citations omitted).

[64] *See* Telex Corp. v. IBM, 367 F. Supp. 258, 353 (N.D. Okla. 1973), *rev'd in part on other grounds*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); text accompanying notes 24-26 *supra*.

[65] *See* text accompanying note 64 *supra*. Both the Bayh and ABA bills, *supra* notes 50-56, recognize that a partial settlement will extinguish the right to damages.

[66] The subsisting damages theory should not be confused with the situation where a *claim* subsists, but is unenforceable. The most obvious case is a claim against someone not subject to personal jurisdiction. Although a judgment of dismissal for lack of jurisdiction is valid and final as to that issue, the plaintiff's substantive claim subsists, that is, the judgment does not actually extinguish plaintiff's right to bring an action on the same claim. Segal v. American Tel. & Tel. Co., 606 F.2d 842, 844 (9th Cir. 1979); *see* Weston Funding Corp. v. Lafayette Towers, Inc., 550 F.2d 710, 713 (2d Cir. 1977), *aff'g* 410 F. Supp. 980 (S.D.N.Y. 1976); 1B J. MOORE'S FEDERAL PRACTICE ¶ 0.405[5] (2d ed. 1980). Similarly, if a contract claim is held to be barred by the statute of limitations, a new promise to pay the contractual obligation will be held enforceable because the underlying claim has never been extinguished by payment. 18 WILLISTON ON CONTRACTS §§ 2047-2054 (3d ed. 1978); *see, e.g.*, Nyhus v. Travel Mgmt. Corp., 466 F.2d 440, 451 (D.C. Cir. 1972) ("[a] conventional statute

plaintiff retains his "right" to the entire $100,000 in damages despite having already received three-fourths of that amount.

Generally, the adoption of either view is of no moment since a plaintiff cannot collect actual damages from more than one defendant. In antitrust litigation, however, where the damages are trebled, the distinction becomes crucial. Although the plaintiff cannot collect the $75,000 again as actual damages under the subsisting damages theory, his right to those damages is retained through judgment. The settlement deduction only takes place at the time of collection. This is the theory of legal rights under which the full $100,000 is trebled before deducting the settlement. It unnecessarily allows the recovery of an amount equal to twice the previously paid claims. Such an approach is bad law and bad policy.

Clearly, courts will not wish to delve into theories of rights and liabilities without some method of applying them in a particular instance. In this case, however, the application is relatively simple. The key is the interpretation of the clause "shall recover threefold the damages by him sustained."[67] The problem arises because there is no statutory provision governing the time when the damages are to be computed. Because trebling takes place at the time the judgment is returned,[68] the phrase "damages by him sus-

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of limitations operates upon remedies and not substantive rights; its running extinguishes, not the obligor's obligation, but rather the obligee's power to enforce it.") (footnotes omitted); Hayden v. International Banking Corp., 41 F.2d 107, 109 (D.C. Cir. 1930) (new promise acknowledges subsisting personal obligation to pay). Payment of the damages would destroy or extinguish the claim or right. Under the current *Flintkote* rule, however, the effect is that payment by the settling party discharges the claim against the settling party, but fails to extinguish the right to damages. *But cf.* Teledyne Mid-America Corp. v. HOH Corp., 486 F.2d 987, 992 (9th Cir. 1973) (payment as full satisfaction of larger debt as accord and satisfaction *discharges* original obligation).

The *Flintkote* rule defies the general legal theory underlying the concept of settlement, whereby a settlement both discharges the claim and destroys the legal right to damages. *See* Protective Closures Co. v. Clover Indus., Inc., 394 F.2d 809, 812 (2d Cir. 1968); Cia Anon Venezolana De Navegacion v. Harris, 374 F.2d 33, 35 (5th Cir. 1967) (settlement is as conclusive of parties' rights as judgment would be if it had been litigated); Swift Chem. Co. v. Usamex Fertilizers, Inc., 490 F. Supp. 1343, 1356 (E.D. La. 1980), *aff'd*, 646 F.2d 1121 (5th Cir. 1981) ("[s]ettlements generally are viewed as binding, final, and as conclusive of rights as a judgment" (citation omitted)). *See also* Dakota County v. Glidden, 113 U.S. 222, 225 (1885) (valid settlement *extinguishes* cause of action).

[67] 15 U.S.C.A. § 15 (1976 & 1981 Supp.).

[68] The jury has no discretion in interpreting the treble damage clause in antitrust suits. Indeed, the jury should not be informed of the trebling provision. *See, e.g.*, Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 989 n.21 (5th Cir.), *cert. denied*, 434 U.S. 1087 (1977); Sulmeyer v. Coca Cola Co., 515 F.2d 835, 852 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690, 695 (5th Cir. 1975), *cert.*

tained" should be read as referring to damages remaining after the deduction of any settlement. These are the only damages for which the plaintiff remains uncompensated at the time of judgment. These are the damages in suit and these are the damages which should be trebled.

On this reading, the hypothetical intent of Congress is to allow the threat of treble damages to function as the primary deterrent of illegal conduct while also serving as a strong motivation to settle cases before trial.[69] It also avoids imputing to Congress an intention to allow more than treble damages based on the possible coincidence of settlements. Even though the guilty defendant in an antitrust case is a wrongdoer, this does not obviate the need for fairness.[70] Congress set the punishment at treble damages, but there is no valid reason to disregard equitable considerations in prescribing that punishment.

Currently, a defendant which does not settle bears the risk of liability for huge damages. Ultimately, a defendant may be held liable for treble the actual damages remaining in the case and double the damages already paid by all other defendants. The second segment of this liability is what is at issue here. Assuming ar-

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denied, 424 U.S. 943 (1976); Lehrman v. Gulf Oil Corp., 500 F.2d 659, 666-67 (5th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975); Semke v. Enid Auto. Dealers Ass'n, 456 F.2d 1361, 1370 (10th Cir. 1972); Sablosky v. Paramount Film Distrib. Corp., 137 F. Supp. 929, 941-42 (E.D. Pa. 1955); Webster Motor Car Co. v. Packard Motor Car Co., 135 F. Supp. 4, 11 (D.D.C. 1955), *rev'd on other grounds,* 243 F.2d 418 (D.C. Cir.), *cert. denied,* 355 U.S. 822 (1957). *But see* Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, 203 F.2d 676, 678-79 (2d Cir. 1953); Cape Cod Food Prod. v. National Cranberry Ass'n, 119 F. Supp. 900, 911 (D. Mass. 1954).

[69] *See* note 8 *supra.* Regarding the effectiveness of treble damages, one commentator has stated:

> Notwithstanding a great increase in the number of successful treble damage suits, it would be extravagant to say that the antitrust laws have become self-enforcing or that businesses are piously policing each other. Rather, in the great majority of [the then] recent successful cases, the federal policeman already has arrived and taken the culprit away, leaving the treble damage plaintiff with a ready-made case. And although it is possible that the publicity given to successful treble damage suits may itself have frightened a wayward few into good behavior, the chances are that their chief deterrent effect has been to encourage consent decrees by discouraging defendants in a Government action from litigation to a final judgment.

Doyle, *Treble Damages and Counsel Fees,* in SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, AN ANTITRUST HANDBOOK 549-50 (1958).

[70] "[T]he plaintiff-oriented, discriminatory effects of the current settlement rule" are clear. Sullivan, *supra* note 3, at 422; *see* Gomes v. Brodhurst, 394 F.2d 465, 468, 470 (3d Cir. 1967); Little Rock School Dist. v. Borden, Inc., [1979] 937 ANTITRUST & TRADE REG. REP. (BNA) A-30, A-31 (E.D. Ark. 1979).

guendo that treble the actual damages remaining in the case is an appropriate penalty devised by Congress, the additional liability—double the damages already paid by all others—amounts to a penalty for proceeding to trial. This penalty is divorced from the initial conduct which gave rise to the suit and its amount bears no relationship to the wrong committed. There is no justification for the imposition of such a wanton and basically unfair penalty.

Finally, the current rule promotes the inefficient use of judicial resources. In light of the crisis of calendar congestion confronting our courts, it behooves us to promote methods of civil dispute resolution which minimize the strain on our judicial resources.[71] In addition to the strong social policy favoring the compromise of disputes, the economic argument also is a factor of long standing.[72] By enabling the plaintiff to recover nine times the actual damages for which he is at risk, however, *Flintkote* provides the plaintiff with an enormous incentive to force the case to trial against at least one defendant. While we can maintain confidently that Congress intended to encourage private suits, it is absurd to say that Congress wanted to discourage pretrial settlement of those suits.

CONCLUSION

The abandonment of *Flintkote* would preserve a plaintiff's incentive to sue while reducing his incentive to progress to trial. Moreover, it would eliminate those factors prompting defendants to enter into inequitable settlement agreements in order to avoid monumental treble damage liability. Indeed, no justification exists to further encourage plaintiffs to proceed to trial by supplying a pot of gold which Congress never intended to place there. *Flintkote*'s creation of that pot was unwise, unfair, and unnecessary to effectuate congressional intent. Enunciated by one court in 1957, the *Flintkote* rule should be discarded by the courts today.

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[71] *See* Cooke, *The Highways and Byways of Dispute Resolution,* 55 ST. JOHN'S L. REV. 611-12, 625 (1981); note 10 *supra.*

[72] The economy of judicial resources is not only one of the keystones of modern procedural philosophy, it is an issue of particular urgency in the antitrust field. "The monstrous, indeed grotesque, proportions of the modern antitrust suit are difficult to convey to the uninitiated. . . . The ordinary antitrust case is unmanageable . . . being in the nature of [a] malignant [growth] on the judicial system." R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 232 (1976). Use of the judicial system is an external cost of resolving the dispute which full settlements lessen or eliminate.